Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-350

ATLANTIC IMPROVEMENT CORPORATION

Petitioner,

vs.

THE CITY OF NEW YORK

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Opinion of the Court of Appeals Dated June 10, 1976

State of New York
Court of Appeals

2 **No. 249**

In the Matter of the

CITY OF NEW YORK,

Respondent,

(The lines of Rockaway Point Boulevard and the lines of Beach 222nd Street and other streets in the Borough of Queens)

ATLANTIC IMPROVEMENT CORPORATION,

Appellant.

(249)

MEMORANDUM:

On the prior appeals we considered the appellant's argument that the Constitution prohibits the court from excluding evidence of comparable sales. We also considered the related argument that the award for the condemned properties should not be lower than the value placed on certain "inferior" comparables. The simple answer is that the proof submitted during the two trials of allegedly comparable sales did not involve property which could be considered in any way or on any analysis comparable to the condemned property. In other words the proffered comparables were neither inferior nor superior to the condemned property, but rather as we noted on the first appeal, they were so radically different in size, adjacent development and physical location "as to throw no help-

ful light on the fair market value of the land condemned'' (28 NY2d 465, 471). This same point was noted by Justice Shapiro on the second appeal (44 AD2d 694). The appellant in effect asks that we reverse our prior determinations, but on the record there is absolutely no basis for doing so.

On this third appeal then, the Appellate Division quite properly rejected the reconsideration of these so-called ''comparables''. Since it has not been made to appear that the determination made by the Appellate Division was other than in conformity with the direction of this Court in remitting the case to that court for reappraisal, the order of the Appellate Division should be affirmed.

• • •

Order affirmed, with costs, in a memorandum. All concur.

Decided June 10, 1976

Opinion of Appellate Division on Remittitur Dated June 23, 1975

(48 App. Div. 2d 895)

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 23, 1975.

HON. FRANK A. GULOTTA,
Presiding Justice

HON. JAMES D. HOPKINS
HON. M. HENRY MARTUSCELLO
HON. ARTHUR D. BRENNAN
HON. J. IRWIN SHAPIRO,
Associate Justices

In the Matter of THE CITY OF NEW YORK,

Respondent-Appellant,

(the lines of Rockaway Point Boulevard and other streets in the Borough of Queens).

(Index No. 13004-1963)

In the Matter of THE CITY OF NEW YORK,

Respondent-Appellant,

(the lines of Beach 222nd Street and other streets in the Borough of Queens).

(Index No. 7324/1964.)

ATLANTIC IMPROVEMENT CORPORATION,

Appellant-Respondent.

Opinion of Appellate Division on Remittitur
Dated June 23, 1975

By a prior order dated April 15, 1974, this court affirmed two first separate and partial superseding final decrees of the Supreme Court, Queens County, both entered July 11, 1973, but, on November 27, 1973, the Court of Appeals modified said order of this court by reversing the award to the claimant and remitting the proceeding to this court for reappraisal in light of the dissenting opinion in this court (Matter of City of New York [Atlantic Improvement Corp.], 44 AD2d 694, mod. 35 NY2d 845).

Now on remand, (1) the decree as to Damage Parcels Nos. 1 to 16, inclusive, and Nos. 16A, 16B, 18, 19 and 20, is modified, on the law and the facts, by reducing the award therein to $7,750,000 and (2) the decree as to Damage Parcels Nos. 22 to 34, inclusive, is modified, on the law and the facts, by reducing the award therein to $7,250,000. As so modified, decrees affirmed, without costs.

In accordance with the memorandum of the Court of Appeals, we have reappraised this case "within the legal framework set forth in the dissent." In so doing, we have arrived at the same result, and for the same reasons, expressed in that dissent.

GULOTTA, P.J., HOPKINS, MARTUSCELLO, BRENNAN and SHAPIRO, JJ., concur.

Opinion of the Court of Appeals
Dated November 27, 1974

(35 N.Y.2d 845)

No. 485

In the Matter of The City of New York (Beach 184th St. to Beach 201st St. in the Borough of Queens).

In the Matter of The City of New York (Beach 201st St. to Beach 222nd St., etc., in the Borough of Queens).

Atlantic Improvement Corp.,

Respondent,

The City of New York,

Appellant.

Memorandum. The order of the Appellate Division should be modified, without costs, by reversing the award to claimant and the matter remitted to the Appellate Division for reappraisal in light of the dissenting opinion. We agree with Justice Shapiro that the award reflects substantial if not total disregard of our previous directions in this case (28 N Y 2d 465). The award shows that great emphasis was placed upon the Birchwood "comparable", which should not have been considered, and that little, if any, weight was given the prior sales of this property. We also agree that the proper test for vacant land, unexploited or only partially exploited, is that found in *Matter of City of New York (Chestnut Props. Co.)* (39

A D 2d 573, affd. 34 N Y 2d 800) and cases therein cited. Since the parties agree that they have exhausted their proof, and since we agree that the dissent has identified pervasive errors of law, we must remit to the Appellate Division for a reappraisal of the case within the legal framework set forth in the dissent. We cannot go so far as to dictate the amount of the award and thus express no view on the actual amounts arrived at in the dissent.

Chief Judge BREITEL and Judges JASEN, GABRIELLI, JONES, WACHTLER and STEVENS concur; Judge RABIN taking no part.

Entered: November 27, 1974.

[SAME TITLE]

Motion for reargument or clarification denied.

May 1, 1975

Opinion of Appellate Division and
Dissenting Opinion of Shapiro, J.
Dated April 15, 1974

(44 App. Div. 2d 694)

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 15, 1974.

Hon. FRANK A. GULOTTA, Presiding Justice
Hon. JAMES D. HOPKINS)
Hon. M. HENRY MARTUSCELLO)
Hon. J. IRWIN SHAPIRO)
Hon. ARTHUR D. BRENNAN) Associate Justices

In the Matter of the City of New York,
Respondent-appellant

(the lines of Rockaway Point Boulevard and other streets in the Borough of Queens).

(Index No. 13004-1963.)

In the Matter of the City of New York,
Respondent-appellant

(the lines of Beach 222nd Street and other streets in the Borough of Queens).

(Index No. 7324-1964.)

Atlantic Improvement Corporation,
Appellant-respondent.

Opinion of Appellate Division and Dissenting Opinion of Shapiro, J. Dated April 15, 1974

Two first separate and partial superseding final decrees of the Supreme Court, County of Queens, both entered July 11, 1973, one as to damage parcels 1 to 16, inclusive, and 16A, 16B, 18, 19 and 20, and the other as to damage parcels 22 to 34, inclusive, affirmed on the opinion of the trial court, without costs. No opinion.

GULOTTA, P.J., MARTUSCELLO and BRENNAN, JJ., concur.

SHAPIRO, J., dissents and votes to reduce the award in the decree as to damage parcels 1 to 16, inclusive, and 16A, 16B, 18, 19 and 20 to $7,750,000 and to reduce the award in the decree as to damage parcels 22 to 34, inclusive, to $7,250,000, with the following memorandum, in which HOPKINS, J., concurs:

Although this proceeding was retried, as directed by the Court of Appeals (Matter of City of New York [Atlantic Improvement Corp.], 28 N Y 2d 465), many of the same errors in computing value committed upon the first trial were repeated upon the retrial.

The subject property is located at the westerly end of the Rockaway peninsula. It consists of some 785 acres and is known as Breezy Point.

When Breezy Point was sold to the claimant's predecessor in 1960 the land was improved with two beach clubs and approximately 3,000 small beach summer cottages which had been constructed on lots leased to the purchasers of the cottages. The vast majority of the cottages were on the central portion of the tract. By that time about 400 of the dwellings were used for year-round occupancy. The entire

785-acre tract was placed on the market in 1958. It was listed wtih various brokers and attempts, all unsuccessful, were made to put syndicates together to acquire the property.

On February 9, 1960, Rockaway Point Development Corp. ("Rockaway Point") contracted with Urban Improvement Corp. ("Urban"), a predecessor of the claimant, to sell it the 785-acre tract for $17,500,000, all cash. Title was to close on October 1, 1960, adjournable to January 10, 1961, time to then be of the essence. Rockaway Point advised the buyer that the owners of the cottages would resist any development requiring their ouster. The purchaser nevertheless announced that it planned to create a "city within a city" by erecting high-rise apartment houses and made known its intention not to renew the tenants' 10-year ground leases. The tenants thereupon, in an effort to protect their homes and to resist any attempt to destroy their investments, united and formed the Breezy Point Cooperative ("Co-op").

On December 8, 1960, Urban assigned to Co-op the right to purchase 415 acres of the property in return for the latter's agreement to pay $11,990,750 of the $17,500,000 which Urban had contracted to pay for all 785 acres. This left Urban with two areas: a 143-acre section at the eastern end of Breezy Point (the "Twin Parks" area), and a 209-acre section at the western end (the "Tip" area). Additionally, by virtue of a restrictive covenant agreement, a right of way consisting of approximately 16 acres was reserved by Urban in order to give it access to the otherwise landlocked Tip. Urban agreed to relocate 250 bungalows in the Twin Parks area to the section owned by Co-op.

The transaction with Co-op reduced Urban's purchase cost from $17,500,000 to $5,509,250 and left it with 370 acres, not including a 21-acre section not condemned. Interestingly, the claimant's efforts to obtain FHA mortgages for its

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proposed development of apartment houses in the 21-acre area not condemned (which lies adjacent to the Twin Parks section) were unsuccessful because the FHA determined that the erection of high-rise apartments was economically unfeasible. The FHA, in its rejection, noted that the land was in an area far removed from transportation and employment and was constantly flooded during periods of storms, tides and hurricanes and that the cost of fill, street improvements, sewers and water would be inordinately excessive.

In June, 1962 the claimant acquired title to 196 acres of land under water, or formerly under water, by State grant at a cost of $96,359, or one cent per square foot.

The Court of Appeals, in reversing the previous total award of $39,775,208, pointedly noted that it was more then seven times the amount that the land, in substantially the same condition, had cost the claimant only three years prior to the condemnation. It commented that only a small portion of the claimant's extensive development plans had been set in motion; and that was entirely in the 21-acre area not taken by condemnation. Although detailed plans for the Twin Parks area had been projected, no work had been started or, for that matter, even contracted for. The Court of Appeals referred to the proposals for the Tip as "a plan without detail" (*supra*, p. 470). It aptly described the Tip as "low-lying and exposed to strong tidal and wind action," requiring "extensive fill to be usable for any residential development" (*supra*, p. 470). The projected utilization of the Twin Parks area, it said, was dependent upon the acquisition from the city of land under Jamaica Bay which, if and when acquired, would require extensive fill. Under these circumstances, the Court of Appeals held that it was improper, as a matter of law, to award damages based on capitalization of estimated income, as fair market value

could not be properly measured on projections of income from nonexistent structures on land which required extensive physical change to render it usable for the intended purpose.

The court also noted that the proof offered of comparable sales shed no light on value. The proffered sales were considered by the court to be radically different in size, adjacent development and physical location. It stated the rule to be applied on the retrial in the following unmistakable language (*supra*, p. 472):

> "It should not be a matter of insuperable difficulty for claimant to establish the fair market value of the land taken in its actual physical state without recourse either to capitalization of income on unstarted projects or to comparisons of other properties essentially dependent on the same future projects. Some consideration *should be given to the sale of the large acreage of contiguous land by claimant's predecessor a few years before condemnation as well as the price paid by claimant for the land itself*" (emphasis supplied).

Unfortunately, Special Term in rendering a total award of $31,000,000 ($16,300,000 for the Twin Parks area and $14,700,000 for the Tip) ignored the guidelines laid down by the Court of Appeals and, in the main, repeated the mistakes which had resulted in the original grossly excessive award. Special Term held that the best use of the property was as a Planned Unit Development (hereafter PUD) consisting of an apartment house complex with ancillary facilities. Despite the clear statement of the Court of Appeals to the contrary, it held that the sale to the Co-op was of no aid in determining value and that the sale to Urban had been for less than the full market value. These were therefore excluded from its consideration. While

agreeing that the claimant's proof of other sales did not produce any which were truly comparable, the Special Term found "a glimmering of the path to the market place" in a sale in Bayside. It concluded that there were truly no appropriate comparable sales, that the land was vacant and unproductive, that there was no income to capitalize and that the actual purchase price and the assessed valuation did not furnish a true guide to value. It therefore made a valuation based upon what it denominated as basic equitable principles of fairness.

In my considered opinion, the awards under review are neither fair nor equitable but, on the contrary, represent an unconscionable raid upon the public purse. In the face of proof which clearly demonstrated the economic and practical unfeasibility of the erection of a PUD, Special Term's finding that a PUD was the highest and best use to which the property could be put is inexplicable.

The community planned for the Twin Parks area was to contain 55 apartment houses, including dozens of high-rise buildings at a total development cost of from $150,000,0000 to $200,000,000. As noted, the FHA considered even a small part of any such proposed development to be economically unfeasible. It is not open to dispute that work in the Twin Parks area had neither been contracted for nor started at the time of condemnation, that the financing procurable was grossly inadequate and that the claimant was wholly inexperienced in the development of even small scale apartment house complexes.

In such a situation, where the proposed high risk development is to take place in a remote, inaccessible area and where there is a complete absence of credible proof that the venture is economically sound, we may not, by any common-sense standard, assume its ultimate success. Indeed, every realistic sign points to its probable failure. It

must be remembered that approximately seven feet of fill was required to first raise the land to grade and that 25% of all the acreage would necessarily have to be devoted to streets and nonincome-producing public facilities. The claimant itself estimated that it would take seven years to develop the Twin Parks tract alone for the proposed use. It estimated its development costs therefor at between $150,000,000 and $200,000,000. Completion of its PUD concept of creating a full-grown community on both tracts would therefore require at least twice that investment. *However, in over a decade, not a single conventionally financed high-rise apartment house had been successfully completed anywhere on the Rockaway peninsula.*

Furthermore, the development plan hinged on acquiring and filling in a sizable tract of city-owned land in Jamaica Bay. The remapping of streets, rezoning, agreements with the city on public schools, police and fire protection, etc., had already encountered substantial public opposition. Legislation aimed at alienating the city's land under water had not only failed of passage in 1962, but was not even reintroduced at the 1963 legislative session.

With conventional mortgage financing covering only half the amount per apartment sought from the FHA, the claimant had commenced construction of eight apartment houses on the 21-acre site, without provision for schools and without encountering the remapping, rezoning and land-acquisition problems inherent in the development of the balance of the planned community. Although it had mortgaged *all* of its land and assets to finance those buildings, it faced a shortage of $6,500,000 in the funds required for their completion at the time it abandoned construction.

It is therefore clear that normal financing was not available for executing the PUD concept in this remote area and the contemplated seven-year development period for the

smaller tract indicated that it would require at least 14 years before the entire PUD could be completed.

The claimant made no attempt to establish that the abandoned buildings would have proven profitable, so as to afford some basis for assuming that a similar development of the entire tract might also have proven economically viable. In sum, the rule that an estimated income stream from a nonexistent improvement may not be valued by capitalization was used by the claimant to avoid putting in proof that the PUD could be profitably developed. Its expert, Mr. Powers, did not testify as to the economic viability of the project. Indeed, he indicated that he had not considered questions of cost, income or profitability.

Contrariwise, the city's experts testified extensively at both trials as to the economic viability of the PUD concept and concluded that it would have been doomed to failure. Their views, unlike that of the claimant, are amply supported by the evidence.

Additionally, the awards violated the rule that a prospective use which is no more than a hypothetical hope in the mind of the claimant may not be the basis for a finding of value (see Matter of City of New York [Shorefront High School—Rudnick], 25 N Y 2d 146, 149; Triple Cities Shopping Center v. State of New York, 26 A D 2d 744, affd. 22 N Y 2d 683; Matter of City of New York [Broadway Cary Corp.], 40 A D 2d 865, affd. —— N Y 2d :—— [dec. Feb. 20, 1974]). The proposed use was just a hypothetical plan. The development of the Twin Parks area required (1) the acquisition of city land, (2) the ability to properly finance a project whose history indicated the unlikelihood that proper financing could be arranged and (3) thereafter, if that were in fact accomplished, the construction and rental of 55 apartment houses in a remote area inaccessible to transportation.

Dissenting Opinion of Shapiro, J.

The Tip presents an even more outrageous picture. The plan for its development lacked detail. The amount of fill required to raise its upland to grade was 2,150,000 cubic yards. The upland had to be elevated by approximately seven feet.* Work was not to begin on this area for many years. The award for this area was thus improperly based upon a sequence of conjectures (cf. Sparkill Realty Corp. v. State of New York, 268 N. Y. 192, 197).

Although Special Term properly concluded that the proof of sales of other properties revealed none which were truly comparable, it placed some reliance upon the sale of a 52-acre site in Bayside, Queens, overlooking Little Neck Bay, known as Birchwood Towers. That property was to be developed for use as an apartment house complex. It was error, as a matter of law, to consider such sale.

The evidence established that Bayside was a developed community at the time of that sale. It contained apartment houses, small homes, garden apartments, shopping facilities, churches, a community college and parks. The property was located directly across the street from a vast apartment house complex and one block from another such development.

The value of land in a developed residential community such as Bayside may not be attributed to raw, vacant land in a remote inaccessible area. The value imparted to the

* Compare Giarrusso v. State of New York (19 A D 2d 582), in which 7½ feet of fill were required to make 32 acres usable. The claimant's expert valued the property at the price it would bring as filled property and deducted the cost of the fill. In rejecting his testimony the court held (pp. 582-583):

> "It may be inferred from the proof that the accomplishment of such a massive filling job, if done by any normal method, could only take place years or decades in the future. The testimony upon this subject was sheer speculation and an unsound method of computing damage that may not be adopted."

Dissenting Opinion of Shapiro, J.

Birchwood site by the previous apartment house developments on immediately adjoining land was alone sufficient to vitiate any comparability to acreage in a remote area adjoining two bungalow colonies even were we to disregard the reality of the thriving and previously existing community in Bayside.

This court was confronted with a somewhat similar situation in Matter of City of New York [Chestnut Prop. Co.] (39 A D 2d 573). We there noted (pp. 573-574):

> "In our opinion it was error to predicate the award upon the value of a nonexisting income stream from land as if it were improved by buildings which had not been constructed at the time title vested (Arlen of Nanuet v. State of New York, 26 N Y 2d 346, 350). Elaborate forecasts of income from nonexisting structures on land which needed large physical change to be usable for its purposes are not a proper measure of fair market value (Matter of City of New York [Atlantic Improvement Corp.], 28 N Y 2d 465, 470). We are in accord with the city's contention that where, as here, the planned development of land is interrupted by condemnation, the best criterion of market value is the price a purchaser would pay for the land in the state of exploitation to which it had progressed at the time of vesting of title in the condemnor. In the present proceeding the experts for the respective parties agreed that there was no direct comparable market data available to indicate the value of the subject site. In this contingency, the recent actual sale price of the subject property was the best and most substantial evidence of market value. Additionally, the claimant is entitled to be recompensed for developmental enhancement of the property in preparing it for its contemplated use."

Dissenting Opinion of Shapiro, J.

In this case, as in the *Chestnut Properties* case, there is no comparable market data available. Hence, the proper method of valuation is actual sale price plus recompense for developmental enhancement, particlarly as the risks inherent in this venture are much greater than those in *Chestnut Properties.*

The claimant's expenditures include the $5,500,000 purchase price, $5,600,000 on the partial construction of the abandoned buildings, $3,400,000 to rebuild certain beach clubs, $640,000 in bonuses to raise capital, plus real estate taxes, architect's fees, legal fees, etc., totaling, in all, $19,300,000. It has already received $5,600,000 for its abandoned buildings and $4,000,000 for the beach clubs by virtue of the award made at the first trial. At least $1,100,000 will be paid for the land in the 21-acre remainder area, as the city has appraised the value of that land at $54,500 per acre. The claimant's compensation will therefore total at least $10,700,000, independent of the award for the land here under review.

As the awards here will compensate the claimant for the land, we can arrive at a figure for developmental enhancement by deducting from the figure of $19,300,000 the amount allocated by the claimant to its purchase price for the unimproved land—$4,400,000, leaving approximately $15,000,000. We must then deduct from this figure the approximately $10,700,000 already secured (or receivable) by the claimant, which leaves a figure of $4,300,000 representing the costs of developmental enhancement. This figure should be added to the market value of the land based upon the recent actual sales price. (The length of time for which Breezy Point was on the market—*without a buyer*—prior to that sale indicates, contrary to the finding of Special Term, that the price paid was an adequate reflection of true value.)

Dissenting Opinion of Shapiro, J.

The award here made of $31,000,000, considering the amounts already paid to the claimant, would leave it with a profit (exclusive of interest) of about $22,400,000 over its total expenditures. Such a result is unconscionable and insupportable.

Special Term also erred in fixing the value of land under water. It adopted the "ratio method" and fixed its value at one-third of the upland value. This method was predicated upon the assumption that eight acres of land had annually accreted in the 10 years prior to condemnation and would continue to accrete at that rate in subsequent years.

However, the record reveals that the annual rate of accretion had fallen below three acres after 1961, and was down to 2.2 acres after 1967. Hence, the theoretical future accretion of eight acres per year was based on sheer conjecture. I credit, in large part, the valuation of the city expert Tuchler, who included in his total estimate of value all land that might accrete in the future. His appraised value included five cents per square foot for underwater land at the Tip, which was substantially above the one cent per square foot which the claimant had paid the State therefor; and from 8 to 15 cents per square foot for the underwater land in the Twin Parks area, which was twice what the claimant was to pay the city for its underwater land in Jamaica Bay.

On this record there is no justification for an award for the Twin Parks area which is in excess of $7,750,000 or for the Tip area which is in excess of $7,250,000. I would modify the decree accordingly and as so modified would affirm.

Opinions of the Supreme Court of the State of New York, Castaldi, J.

SUPREME COURT,

QUEENS COUNTY,

Special Term, Part IV-A.

IN THE MATTER

of

The Application of THE CITY OF NEW YORK, relative to acquiring title in real property where not heretofore acquired etcetera, within (1) the lines of ROCKAWAY POINT BOULEVARD from Beach 184th St. to Beach 201st St., etcetera, in the Borough of Queens, City of New York.

Index No. 13004/63 (INITIAL PROJECT AREA)

IN THE MATTER

of

The Application of THE CITY OF NEW YORK, relative to acquiring title in the real property where not heretofore acquired etcetera, within (1) the lines of a park bounded generally by the westerly line of Beach 222nd St., and its prolongations, Rockaway Inlet and Atlantic Ocean etcetera, in the Borough of Queens, City of New York.

Index No. 7324/64 (TIP)

Supplemental Opinion of Castaldi, J.,
Dated June 19, 1973

Dated June 19, 1973

By CASTALDI, J.:

In its memorandum decision of June 13, 1973, the court stated that "the court has made the explanation sought by the City regarding the arithmetical unit value of both the Initial Project Area and the Tip". In its oral decision of June 5, 1973, the court recited the requested particulars as to the valuation of the Initial Project Area ($2.65 per square foot for the upland and 90 cents per square foot for the land underwater). With relation to the Tip area, the court pointed out in its oral decision that the lump sum award of $14,700,000 for both the upland and the land underwater was on the overall basis of one dollar per square foot. Further, the court observed that its "valuation of the Tip on an overall unit basis is about 47.5 per cent of the valuation found by the Court for the Initial Project Area" (Minutes of Hearing on Objections, pp. 2093 and 2102). For the further enlightenment of counsel, the court attributed to the Tip area a valuation of $1.35 per square foot for the upland and 45 cents per square foot for the land underwater.

The final decree to be submitted by the Corporation Counsel shall be in accordance with the court's oral decision of June 5, 1973, the memorandum decision of June 13, 1973, and this supplemental memorandum decision.

M. A. C.
J. S. C.

Supplemental Opinion of Castaldi, J.,
Dated June 13, 1973

Dated June 13, 1973

By CASTALDI, J.:

On June 5, 1973, the court rendered its oral decision overruling all of the City's objections to the tentative decree except that "the court has made the explanation sought by the City regarding the arithmetical unit value of both the Initial Project Area and the Tip." (Minutes of Hearing on Objections, p. 2105.) Upon the hearing of objections, the City raised an additional issue as to "whether or not substantial compensation was granted for Damage Parcel 18." This issue has now been withdrawn by the City.

The Corporation Counsel is directed to submit the appropriate final decree.

M. A. C.
J. S. C.

Oral Opinion of Castaldi, *J.*
Dated June 5, 1973

The Court: Gentlemen, this Court has reviewed his notes that the Court deems pertinent to this hearing on objections. The Court has before him his notes made during the course of the Corporation Counsel's argument today in support of the City's objections, namely, the Corporation Counsel seeks to have the Court particularize in detail, if you will, the manner of "in arriving at its awards." The Court deems the decision rendered by the Court on April 3, '73, to be sufficiently broad in scope and content to meet the requirements of either statutory law, or decisional law.

Nevertheless the Court recognizes the importance of this case to both the claimant and to the City and will make some observations for the guidance or enlightenment of counsel, and perhaps for their aid in the Appellate process.

The Corporation Counsel referred also to the Birchwood sale, and inquired of the Court the extent of its consideration of the Birchwood sale, whether it regarded it as more valuable or less valuable than other sales. The answer to that query by the Corporation Counsel boils down to this: The Court certainly considered the Birchwood sale, but not to the exclusion of the other sales.

The Court went all the way in considering sales proffered by both the claimant and by the City, albeit the Court has no hesitancy in declaring that none of the sales were true comparables. But the Court did consider the Birchwood sale, and did not seek to make adjustments as such with relation to the Birchwood sale, because it was not a true comparable, and I do believe that without citing chapter and verse, it is so reflected in this Court's post trial decision.

Oral Opinion of Castaldi, J.
Dated June 5, 1973

So far as adjustments are concerned that the Corporation Counsel mentioned today as to the amount of land for street use, and converting gross acreage to net acreage, this Court's decision of April 3rd, on page 20, indicates that it did consider the very proposition of converting gross acreage to net acreage. And I am not now, Mr. Freedman, passing upon the more precise issue that you raised during the argument today about the particular street in D.P. 18 and D.P.'s 22 to 26 involving the right of way. I will come to that later.

And then the Corporation Counsel asked insofar as the tip is concerned, whether the Court considered the items or issues or factors of delay in development of the tip vis-a-vis the initial project area, and the accessibility or non-accessibility of the tip as related to the initial project area, and also the amount of fill that would be required for the development of the tip as compared with the development of the initial project area.

The answer is yes, very definitely. The Court did consider those factors, among others, so far as valuing the tip is concerned. Otherwise, there would not be that substantially less value that was determined by the Court to be the fair market value of the tip as relates to the fair market value found by the Court for the initial project area.

The Corporation Counsel also asked what was the obvious, I think, because the Corporation Counsel pretty much did his own arithmetic as to the awards made by the Court for both the initial project area and the tip. And so that it will be crystal clear, as to the initial project area, which incidentally, and this is only for the record as that it will be clear upon appeal, the initial project area is also referred to as the Two Parks Area.

Oral Opinion of Castaldi, J.
Dated June 5, 1973

The Court made an award for the initial project area in the total principal amount of $16,300,000, resulting in an overall unit value of approximately $2.10 per square foot. Again arithmetically there are, according to this Court's reliance upon the statement made in the briefs or otherwise by counsel for both the claimant and for the City, the initial project area comprises a total of upland and land underwater of 7,760,122 square feet, which computed on the basis of a unit value of $2.10 per square foot results in the figure or award made by this Court of $16,300,000.

As to the tip, that comprises a total of 14,666,000 square feet, which computed at a unit value of one dollar, that comprising both upland and land underwater, the arithmetic comes out to $14,666,000 which the Court rounded out to $14,700,000 as a lump sum award for the tip again inclusive of both the upland and the land underwater.

In reflecting the overall unit valuations geared to the lump sum awards that the Court has just stated, and having been made separately for the initial project area and for the tip, the Court was mindful that the sale to the claimant, and the sale by the claimant to the cooperative was similarly on a lump sum basis without a breakdown between the upland and the land underwater.

Frankly, among other things, this Court asked himself this question before he rendered his determination as to the award for both the initial project area and the tip, and that question was this: As of the title vesting dates, what would a prudent buyer pay in an arm's length transaction for the initial project area and the tip, lock, stock and barrel, if you will, in their existing states of exploitation? Accordingly as this Court pointed out in his decision, the lump sum awards were made by way of answering the ques-

tion that the Court has just postulated. That is not to say that the Court equated the value of the land underwater with the value of the upland.

I don't mind saying again for the enlightenment of counsel that as a check on this Court's lump sum awards, and the resultant unit values, I did consider the evidence in the record relating to separate valuations for the upland and the land underwater for both the initial project area and the tip. I am mindful of the testimony of the claimant's expert, Mr. Powers, and I referred to it during the course of the Corporation Counsel's argument today that the claimant's expert, Mr. Powers, used a dual method of valuing the land under the water. One way was the ratio method by which the land underwater was valued at one-third of the value of the upland. The value of the upland in Mr. Powers' opinion was $3.75 a square foot. On his ratio method, and for the reasons as were explained by him all in the record, and mindful too that he said that the underwater land was accreting at the rate of eight acres per year, Mr. Powers reached a valuation for the underwater land of $1.25 a square foot. And then the second method that was referred to and used by Mr. Powers was to determine the present value of the prospective accretion on the basis of eight acres annually.

I know that that was the subject of conflicting opinions as to the amount of accretion. And mindful too that according to Mr. Powers, in order to reflect any diminution in the accretion rate, he, Mr. Powers, adopted a discount rate of about 50 percent higher than the ordinary rate, and on that basis Mr. Powers' figure resulted in a value of about $1.90 a square foot for the land underwater.

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The Court considered all that in reaching his own valuation of both the tip and of the initial project area. In this connection the Court is mindful that there was no testimony given, no proof offered by the City of any probative value as to a separate value accorded by the City experts to the land underwater. They said in substance that they considered that the value of the land underwater was reflected in the value of the upland, but at no stage do I recall that there was any specific value that was thus accorded to the land underwater as being reflected in the value of the upland.

This Court went further. I was just curious as to a check on the award reached by this Court as to the values for the initial project area and the tip. I was mindful that in the initial project area, I am reading from my notes which are from the record, and I believe they are correct, 5,339,498 square feet of upland in the initial project area, and 2,420,624 square feet of land underwater.

Guided by the evidence in the record, by adopting Mr. Powers' testimony of valuing the land underwater on a one-third ratio value to the upland, I would have $2.65 per square foot as the value of the upland, and 90 cents per square foot as the value of the land underwater in the initial project area resulting in the figure of $16,328,230, or rounded out to $16,300,000.

I will tell you why that was particularly informative to the Court and somewhat comforting in a check on the valuations reached by the Court.

One, the valuations of course reached by the Court are in the light of all of the factors recited in this Court's post trial decision. But I could not help but also see, among the Court's copious trial notes, the fact that Mr. Tuchler, one

of the City's experts on the second trial, who was also an expert on the first trial, reflected a value of $2.75 per square foot for that land in the remainder area that was used by the claimant for the proposed construction, or construction in progress of the apartment buildings.

That appraisal of $2.75 appears in Mr. Tuchler's appraisal used upon the first trial which is labelled "remainder," in City's Exhibit 98. I wouldn't refer to that except that it was the subject also of cross examination upon the second trial, and that cross examination appears—of Mr. Tuchler—at pages 1843 and 1844 of the second trial. I am mindful of Mr. Tuchler's explanation as to his use of the $2.75 per square foot valuation. But no matter how you slice it, it seems to me that it is a rather persuasive factor that this Court's valuation of $2.65 per square foot of the upland in the initial project area being lower than the City's own figure is pretty much in line as representative of a fair valuation.

I cite that not as being either the controlling or exclusive factor at all of reaching a valuation of the initial project area, or indeed of the tip. But I refer to it simply as one of the factors that did enter into the mind of the Court in determining the ultimate award to be made here.

The Court of course is not called upon to recite chapter and verse of every testimony that he took into consideration, but I mention that because it dovetails so closely to what this Court ultimately found as being fair valuation for the land and for—for both the upland and the underwater land that is here in issue.

Some reference was made to the cost to fill and bulkheading. I would say this. Unquestionably the better approach to value in a case such as this, or in any condemna-

tion case where you have to compare raw acreage with raw acreage. When I say raw acreage, that is not to say the Court is not mindful of the state of exploitation of the Breezy Point land. But if the parties were able to compare the state of the land at Breezy Point with land in a comparable state of exploitation, the case would be free of difficulties inherent in seeking to make adjustment for fill and bulkheading. Because in such attempted adjustments you have to avoid the speculative pitfalls that the Courts refer to in cases such as the Triple Cities Shopping Center Case.

Nevertheless, as pointed out in this Court's decision after trial, it did not overlook the factor of fill and bulkheading, and particularly in that the fill and bulkheading at the tip would require a greater amount than fill at the initial project area.

I want to make one other, I think, significant observation. It is this: I sought to make a very careful analysis of the City's appraisals of the initial project area and the tip. I did, I believe, all of the requisite arithmetic in that analysis of the City's appraisals. And I found that Mr. Seltzer's valuation of the tip on an overall unit basis per square foot was about 47 percent of his overall valuation per square foot of the initial project area.

Mr. Tuchler's valuation is about 43 percent of the tip vis-a-vis the initial project area. The Court's valuation of the tip on an overall unit basis is about 47.5 percent of the valuation found by the Court for the initial project area.

So you can't get, I think, much closer than that, if you are going to use ratios based even upon the City's valuation.

In conclusion, this Court made, as previously stated to counsel, several visits to Breezy Point. One in company

with counsel prior to the commencement of the trial proper, and one that this Court did on his own. I viewed not only the land in issue, but also the surrounding area. The Court also viewed each of the sites of the comparable sales, and that is known to counsel on both sides in that that view was with Mr. Seltzer for the City and Mr. Powers for the claimant.

The views made by the Court of both Breezy Point and surrounding area and the comparable sites were of immeasurable aid in this Court's consideration of this case. I have no hesitancy in saying that in the Court's view, the comparable sites that were proffered by both sides do not measure up in value to Breezy Point.

To put it very bluntly, the Court asked itself the obvious question. As of the title vesting dates, where in the City of New York could you find land akin to Breezy Point with its ocean view for less than an overall unit price of $2.10 per square foot? This brings to mind the observation made by the Court in the matter of County of Nassau, reported at 71 Misc. 2nd 554, at page 556, that waterfront land for residential use—and here I say such as Breezy Point—unquestionably, and this is now a quote from the Court's reported opinion: "Is highly desirable and commands a substantial return in the market."

I think certainly that is the situation with Breezy Point. And perhaps the reticence, if I detect it as such, not intending to be critical, but an observation by the Court, I find one of the difficulties in this case from the viewpoint of the City is its reluctance to recognize the value of Breezy Point as land that is highly desirable and no longer obtainable in the limits of the City of New York with the possible exception of Staten Island. The Court made ex-

tensive remarks, more so than he would in the normal proceeding, but perhaps it will be of aid, let's say more particularly through the medium of appeal both for counsel and for the Appellate Courts.

So far as the objections are concerned, after careful consideration, they are overruled mindful of course that the Court has made the explanation sought by the City regarding the arithmetical unit value of both the initial project area and the tip.

That leaves open the testimony referred to by the Corporation Counsel as to D.P. 18 in the right of way, and whether the City was remiss in that connection or not. I would rather not pass on that now. Frankly, if the City is right, I will do what I think is appropriate to make the proper amendment to a decision by the Court.

I am bothered, and frankly, Mr. Freedman, that involves converting gross acreage to net acreage. That was one of the items that I did consider whether or not this particular area was among those—I don't want to say at this moment yes, I did or did not. Generally did I consider the issue of converting gross acreage to net? The answer is yes. But I will be glad to have both the Corporation Counsel and counsel for the claimant submit some memo to me on that issue, and then the only thing that will be open is that issue.

Otherwise, this is the oral decision of the Court on the hearing of objections.

Opinion of Castaldi, J.,
Dated April 3, 1973

Dated April 3, 1973

By CASTALDI, J.:

These are jointly-tried proceedings in eminent domain involving lands acquired by The City of New York. The condemned parcels of land are located in the Borough of Queens in that portion of Rockaway Peninsula, north and west of Fort Tilden, known generally as Breezy Point. The claimant-owner is Atlantic Improvement Corporation (herein referred to as "Claimant" or "Atlantic").

The Rockaway Point Boulevard proceeding includes all of the land lying generally north and west of Fort Tilden, west to approximately Beach 201st Street, excepting a tract of approximately 21 acres (herein referred to as the "Remainder") located on the westerly side of Fort Tilden. The Remainder area was not condemned.* The lands taken in the Rockaway Point Boulevard proceeding (herein referred to as the "Initial Project Area" or the "Two Parks Site") consist of approximately 122.5 acres of upland and 55.5 acres of land underwater, including foreshore. Title to the Initial Project Area vested in the City on November 22, 1963.

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*The City purchased the lands comprising the Remainder from the Claimant and agreed to pay as a basis therefor the price that is judicially determined for the lands condemned in the Rockaway Point Boulevard proceeding. The City also purchased from the Claimant for the sum of $5.6 million dollars the apartment buildings and related improvements that were in the process of construction on the Remainder area. Although not necessarily inconsistent, this payment for apartment buildings hardly seems compatible with the City's contention that the highest and best use of the Breezy Point land was for one and two-family detached houses. In any event, the court is not concerned in this proceeding with any valuation of improvements.

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The Beach 222nd Street proceeding includes all of the land lying generally west of Beach 222nd Street to the westerly end of the Rockaway Peninsula (herein referred to as the "Tip"). The Tip consists of approximately 209 acres of upland and 127.5 acres of land underwater. Also taken in this proceeding was a strip of land consisting of a road (herein referred to as the "Right of Way") extending from the westerly side of the Initial Project Area across the lands of the Breezy Point Cooperative, Inc., to the easterly side of the Tip, containing approximately 14.5 acres of land.** Title to the Tip and the Right of Way vested in the City on August 31, 1964.

The First Trial; The Decision and Appeals.

These proceedings were originally tried before Mr. Justice Groat, who awarded the Claimant $39,775,208, of which $21,296,439 was for the lands in the Initial Project Area and $18,478,769 was for the Tip area. (N. Y. L. J., June 18, 1968, p. 15, col. 6; N. Y. L. J., June 26, 1968, p. 15, col. 5.)

Upon appeal to the Appellate Division, Second Department, the determination and awards of the Special Term were affirmed without opinion (34 A. D. 2d 995).

Upon cross appeals, the Court of Appeals modified the determinations below by reversing the awards to Claimant and remitted the matter to this court "for further proceedings on the question of damages • • •" (28 N. Y. 2d 465, 473-74, mot. for rearg. den. 29 N. Y. 2d 649). Referring in particular to the principles stated in *Arlen of Nanuet v. State of New York* (26 N. Y. 2d 346, mot. for rearg. den. 27 N. Y. 2d 737; mot. for rearg. den. 27 N. Y.

**The land for the Right of Way was not valued by any of the appraisers. Similarly, this court will exclude the Right of Way for purposes of valuation.

2d 816)* the Court of Appeals held that, as applied to the lands in the subject proceedings, the "capitalization of estimated income" was an impermissible method of valuation. The court also rejected the proffered comparables in that the land in issue was "vastly larger than the land to which it was compared" and "markedly different in adjacent development". Somewhat limited guidance for counsel and the trial court was also indicated by the Court of Appeals at page 472 of its opinion:

> "It should not be a matter of insuperable difficulty for claimant to establish the fair market value of the land taken in its actual physical state without recourse either to capitalization of income on unstarted projects or to comparisons of other properties essentially dependent on the same future projects. Some consideration should be given to the sale of the large acreage of contiguous land by claimant's predecessor a few years before condemnation as well as the price paid by claimant for the land itself."

Of course, the law as formulated by the Court of Appeals is the law of the case. Equally clear and no less imperative is that upon remand it becomes the duty of the trial court to make its independent factual determinations based upon a consideration of the relevant evidence. (*Gugel v. Hiscox*, 216 N. Y. 145, 152; *Ga Nun v. Palmer*, 216 N. Y. 603, 612.)

The Appraised Valuations.

Claimant's appraiser, Theodore J. Powers, values all of the land taken (Initial Project Area and the Tip), including underwater land, at $63,500,000.

Arlen of Nanuet was decided on April 16, 1970, subsequent to the decision rendered by Mr. Justice Groat upon the first trial of these proceedings.

Mac C. Seltzer, one of the City's appraisers, finds a total value of $12,510,750 for all of the condemned land. The City's other appraiser, Jacques O. Tuchler, who testified both upon the first trial and this trial, finds a total value of $11,819,000.

Just Compensation; Highest and Best Use.

It is a constitutional mandate that private property shall not be taken in eminent domain without "just compensation". (U. S. Const. 5th Amdt.; N. Y. Const., art. I, §7, subds. [a] and [b].) Broadly stated, "just compensation" means that the owner is entitled to be paid in dollars and cents the fair market value of his property as of the title vesting date. In reaching a determination of fair market value, the court must consider "the highest and best available use of the property". (*Keator v. State*, 23 N. Y. 2d 337, 339; see also *Olson v. United States*, 292 U. S. 246, 255-256; *City of New York* [*Clearview Expressway*], 9 N. Y. 2d 439, 445; *Matter of St. Agnes Cemetery v. State of New York*, 3 N. Y. 2d 37, 41; *Sparkhill Realty Corp. v. State*, 254 App. Div. 78, 82, affd. 279 N. Y. 656.)

Upon the first trial, Mr. Justice Groat found that the highest and best use of the condemned land was "for a residential community of apartment houses, garden apartments or town houses and private homes with integrated retail business facilities and with portions of the waterfront developed as a marina or such recreational facility". At the outset of this trial, counsel for the Claimant contended that best use was determined, at least implicitly, "by the unanimously affirmed finding of best use made at the prior trial". However, this court took the view that best use is a necessary element of "damages" and therefore the question should properly be considered in the light of all relevant evidence adduced upon this trial.

This view was accepted by Claimant with the observation, however, that "the finding of Judge Groat is certainly persuasive" (Claimant's Post-Trial Brief, p. 1).

Upon this trial, both the Claimant and the City are in agreement that the highest and best use is residential. However, the parties differ as to the type of a residential use. Claimant contends that the best use was "for development as a master planned community containing a homogeneous balance of multi-family high, medium and low rise apartment houses, town houses, community and recreational facilities, commercial retail areas, playgrounds, and open areas". The City asserts that the best use was "for development and improvement with one and two family houses, detached".

INITIAL PROJECT AREA

After reviewing all of the evidence, the court finds that the highest and best use of the Initial Project Area was for development as a "master planned community" encompassing an apartment complex with ancillary facilities.

Claimant's planned community was more than a "speculative or hypothetical arrangement in the mind of the claimant". (*City of New York* [*Shorefront H. S.—Rudnick*], 25 N. Y. 2d 146, 149, citing *Triple Cities Shopping Center v. State of New York*, 26 A. D. 2d 744, affd. 22 N. Y. 2d 683; see *Matter of City of New York* [*Broadway-Carey Corp.*], 40 A. D. 2d 865.) Here, Claimant had an actual ongoing plan in its early stages of development, entitled "A Program for the Development of Breezy Point". This comprehensive plan was prepared for the Claimant by a recognized firm of engineers and architects. (Claimant's Ex. 2.) Significantly, the plan was transmitted to Atlantic in April 1961, long before the title vesting dates. Admittedly, the plan treats in particular with

the Initial Project Area. That is because the Initial Project Area, as stated in the plan, was selected as the site for the initial construction.

Some of the factors found by the court in support of an apartment complex as the best use for the Initial Project Area are here summarized.

(a) *Zoning.* The land was classified in an R-4 zone, which would permit of apartment houses.

(b) *Streets.* An overall new street map with details as to all required streets for the Initial Project Area, designed for apartment house development, was prepared and submitted by the Claimant to all of the requisite City agencies.

(c) *Sewers.* A new drainage plan, including sanitary and storm sewers for the entire Initial Project Area was developed by Claimant. It appears that Claimant completed 97% of the first phase of sanitary and sewer construction in what is now referred to as the "Remainder" area.

(d) *Schools.* An agreement was reached with the City whereby provision was made for two elementary schools and one junior high school, all as shown on Claimant's Site Plan.

(e) *Fire Protection and Water System.* These two facilities were the subject of agreement with the City as part of the plan for the development of the Initial Project Area.

(f) *Other Utilities.* Full provision was made for utility services from the Long Island Lighting Company. Also, arrangements were made for the sale to the Telephone Company of a site for a telephone service building. Upon the

Mayor's announcement of his recommendation of condemnation, the sale was terminated.

(g) *Transportation.* Claimant obtained an agreement from Green Bus Lines, an intra-urban passenger carrier, indicating that "as the development progresses we stand ready to expand our services to meet the increasing transportation requirements of the area".

(h) *Community and Commercial Purposes.* As part of its "master planned community", in 1961 Claimant sold a site to the United Lutheran Synod of New York for church purposes. For its shopping center, Claimant entered into leases with Waldbaums and five other store tenants. Realistically, the leases were vitiated because of the cessation of construction of the apartment houses on the Remainder area in view of the impending condemnation.

(i) *Actual Construction.* As pointed out by the City, it is true that the actual construction of the apartment buildings and other improvements were made by the Claimant in the Remainder area. However, Claimant had to start somewhere with the actual construction phase of its program for development of the Initial Project Area. Claimant elected to commence construction in the Remainder area. In choosing not to condemn the Remainder area, the condemnor may not penalize the Claimant by selective condemnation.

(j) *Economic Use.* The City urges that Claimant has not submitted any demonstrable proof that there would be a demand for rental of apartments at Breezy Point. Of course, the asserted proposition does not permit of an answer with

> mathematical precision. However, from all of the evidence, this much is clear. Since the end of World War II and continuing through the 1960s, Queens County has become more and more a borough of apartment house dwellers and this extends to the outlying areas of the county. Also, despite the increase in the number of apartments, the number of vacancies in Queens has been declining at a faster rate than in the rest of the City. This is understandable in the light of the ever-increasing shift in population to all parts of the Borough of Queens.

To the foregoing, it may be noted that responsible business and financial institutions loaned money, purchased stock and entered into leases with the Claimant, on the basis of its planned development of the Initial Project Area, with construction in the Remainder as the first phase of the development. Surely, this evidence may not be ignored in any consideration of highest and best use.

The determination of highest and best use is a fact finding process coupled to a large degree with a sense of judgment by the court. No single factor is conclusive. The relevant evidence must be considered in its totality. So considered, this court concludes that the best use for the Initial Project Area was a "master planned community" with apartment houses and ancillary facilities.

THE TIP

As with the Initial Project Area, Claimant contends that the Tip may be best utilized for apartment houses as part of its "master planned community". The City asserts that the highest and best use of the Tip is for one and two-family, detached houses, being the same use that the City applied to the Initial Project Area.

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Claimant insists, and not without some support in the record, that the overall plan for the development of Breezy Point as a community was to proceed with the Initial Project Area as the first phase of construction, and to follow similarly with the construction of the Tip. See, for example, Claimant's expressed intention "to develop and improve all of its property and to construct urban residential communities thereon • • • commencing with its Initial Project Area". (City's Ex. 26, pp. 3 and 4.) In similar vein, see the report entitled "Program for the Development of Breezy Point" wherein reference is made to "comprehensive investigations and studies for the preparation of a master plan for the development of the entire area of Breezy Point as a self-contained residential community and to prepare a detailed site plan for initial construction of a portion of the area". (Claimant's Ex. 2, p. 1.) Also, much of what this court said in support of its conclusion that the highest and best use for the Initial Project Area was an apartment complex applies no less to the Tip.

Upon a realistic consideration of all of the relevant evidence, this court finds and ascribes to the Tip a highest and best use as an apartment complex akin to the best use for the Initial Project Area. However, the utilization of the Tip for its best use is not immediate. That factor is considered by the court in its valuation of the Tip.

COMPARABLE SALES

In order to better understand the evidence, the court not only made the statutory view of the subject property but also viewed the entire peninsula at Breezy Point and the site of each comparable sale proffered by the parties.

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Claimant's Comparable Sales.

With commendable candor, counsel for Claimant acknowledge in their post-trial brief (p. 2) that "none of the comparables are exact comparables". The court agrees. However, one of the Claimant's sales (Q-1, known as "Birchwood"), discussed separately, has sufficient attributes of comparability to warrant the court's consideration. As to size, all of the Claimant's sales, excepting Birchwood (52.590 acres), are vastly smaller as compared with the land in issue. Sale Q-2, adjoining the property of sale Q-1, has an acreage of 6.118 acres. Sales SI 1-A and 1-B, being two sales from different grantors at different times to the same grantee, have a combined acreage of 9.565 acres. Claimant's other comparable sales range in size from 1.162 acres to less than 5 acres. It is therefore evident that, excepting sale Q-1, all of Claimant's sales run afoul of the admonition by the Court of Appeals that true comparables may not be vastly different in size from the land in issue.

In support of its valuation, Claimant regards sale Q-1 (Birchwood) as "the closest comparable". Birchwood consisted of approximately 52 acres of unimproved land located in the northeast section of Queens, known as the Bayside-Clearview area. In April 1965 the property was sold for $6,250,000 or $2.73 a square foot. The land was subsequently developed as a complex of high and low rise apartment buildings. Claimant asserts that Birchwood is strikingly comparable to Breezy Point minus ocean, beach and broad bay frontage. The City contends that Birchwood was in a fully populated residential center similar to those properties which the Court of Appeals held impermissible as comparables upon the first trial. Mindful that the area must be considered as of the time of sale in 1965, this court finds that the infirmity asserted by the City does not attach to Birchwood. The City's expert, Seltzer, testified that Birchwood was in

close proximity to several parkways and also close to the Bronx-Whitestone Bridge and the Throgs Neck Bridge. Seltzer further testified that the Birchwood area had a development of apartment houses with a shopping center, schools and other community facilities. Claimant's expert, Powers, testified that "mass transportation was limited to the Q13 bus on Bell Boulevard" which connects with the IRT subway terminal in Flushing.

Although Birchwood is not a true comparable, the court finds that of all the sales, it is in fact the "closest comparable". Birchwood was a large tract of vacant land on the periphery of the City, for use as an apartment complex with features of some similarity to Breezy Point. As such, Birchwood offers some aid or indicia in determining market value of the condemned properties.

The City's Sales.

(1)

In considering the City's sales, the court is aided by Claimant's withdrawal of "all objections and motions reserved at the trial to the receipt of evidence offered by the City". (Claimant's Post-Trial Brief, p. 4.) Of course, the evidence encompasses the City's appraisals and the sales noticed therein. Consistent with the court's approach to the Claimant's sales, the court's consideration of the City's sales is limited to those sales that are not vastly different in size from the land in issue.

City Sales 4 through 10 (Mill Basin). These sales are considered together because they involve contiguous property located in Mill Basin in the Avenue U section of Brooklyn. All sales were made between 1959 and 1961.*

*It appears that there were three resales in 1963 and 1964 of small portions of the Mill Basin property at higher prices. (See Claimant's Ex. 219.)

Sale 4 consisted of approximately 21 acres (unfilled land) and sold for an unadjusted price per square foot of 19 cents. Sale 5 consisted of approximately 22 acres (unfilled land) at an unadjusted unit price of 17 cents per square foot. Each of the other sales was from about two to five acres in size. The unadjusted unit prices of the other sales (filled land) ranged from a low of $1 to $1.69 per square foot with sale 9 having an unadjusted price of $2.10 per square foot. Some of the sales were inland properties and some were waterfront plots. Seltzer gave the "greatest weight" to the Mill Basin sales in his valuation of the Initial Project Area.

City Sale 11 (Twin Pines). This sale in December 1963 consisted of 134 acres. The unadjusted sales price was $1.37 per square foot. At the time of the sale, the property was zoned R-3 (one and two-family houses). The Twin Pines tract was closer to adjacent development but was relatively inaccessible except for its proximity to Shore Parkway which separated the land from Jamaica Bay. No beach or bathing facilities were available.

Four years later (December 1967) there was a sale of the Twin Pines property for a Mitchell-Lama development, at $2.10 per square foot. (Claimant's Sale ML-1.)**

City Sale 12 (Co-Op City). This was a sale in July 1965 consisting of 301 acres of largely marsh land used for a Mitchell-Lama development in the northeast section of the Bronx. The property was with limited amenities at the time of the sale. "Water orientation" consisted of frontage of some of the property on Hutchinson River.

**In what might be interpreted as a recognition of the difficulty in establishing valuation, counsel for both sides consented to have the court consider Mitchell-Lama sales. (But see *Matter of City of New York [Shorefront H.S.-Rudnick]*, 25 N. Y. 2d 149.)

There was no beach and the river could not be used for bathing. Although the sale was at least a distress sale if not a forced sale, the unadjusted price per square foot was $1.22.

City Sale 3 (Public Place). This was a sale in 1959 of 108 acres located in an area known as Public Place, south of Rosedale and near the Kennedy Airport. The sales price was 50 cents per square foot. Apart from size (108 acres) the property is devoid of any similarity to Breezy Point.

City Sale 14 (Staten Island South Shore Golf Course). This was a sale in 1963 of a golf course consisting of 216 acres at a unit price of 31 cents per square foot. What was said as to City Sale 3 applies no less to this sale. Apart from size (216 acres) the property has no amenities similar to Breezy Point. The property is located in close proximity to the industrial area of Staten Island, across the Arthur Kill from the industrial area of New Jersey.

City Sales 15-37 (Nassau County). These sales, between 1959 and 1966, involve properties in the communities of Baldwin, Merrick, Bellmore and Lido Beach. The acreage of the parcels ranges from 10 acres (Sale 25) to 133 acres (Sale 17). The unadjusted sales price varies from 15 cents per square foot (Sale 19) to 88 cents per square foot (Sale 36). Apart from differences in size (as to some parcels), zoning and amenities, properties for residential use in Nassau County present an entirely different sellers' and buyers' market than residential properties in New York City. This alone makes it impractical to consider Nassau County sales as comparables.

From a consideration of the City's sales, this much is clear. As with the Claimant's sales, none of the City's sales is an "exact" comparable. Nevertheless, under the vexing circumstances of this case, some of the City's

sales above indicated offer at least a vestige of value as related to Breezy Point.

(2)

There remain for consideration (1) the original sale in 1960 of the entire Breezy Point acreage to Claimant's predecessor for the contract price of $17.5 million, and (2) the sale by assignment from Claimant to the Breezy Point Cooperative of 415 acres of the same lands in their existing state and use for $12 million.

Claimant contends that both sales are in the nature of "forced" sales because each sale has the element of compulsion. Claimant points to such factors in the original sale as the indicated need or desire of the sellers to sell quickly on all cash terms, the refusal of the sellers to make any representations as to the rights of the tenant leaseholders, and the unlikelihood of any purchaser being able to develop Breezy Point because the property was encumbered with ground leases to over 3,000 bungalow owners. Further, Claimant cites the varied militant activities of the organized bungalow owners that induced the sale to the Cooperative and posed a real threat to Claimant's plan for development of Breezy Point. Although these factors were urged at some length by Claimant in its brief as appellant (pp. 26-28) in the Court of Appeals, that court nevertheless suggested that "some consideration" should be given to the subject sales and the purchase price paid by Claimant. Accordingly, this court has considered all of the facts and circumstances attendant the two sales involving Breezy Point. In the main, the proof consists of the testimony given by John E. Marqusee, the Claimant's president, the testimony of W. James MacIntosh, the attorney for the original sellers-owners of Breezy Point, and the testimony of Alexander Greeley, a co-chairman of the Joint-Action

Opinion of Castaldi, J., Dated April 3, 1973

Committee formed by the tenants-owners of the bungalows at Breezy Point. The court further considered the testimony of Powers, Claimant's expert upon this trial, and particularly Powers' comments under "Sales of the Subject Property." (Claimant's Ex. 202, pp. 63-68.)

A forced sale has been defined as a transaction "where there is an element of compulsion either on the part of the seller who is obligated to act with undue haste, thereby affording him an inadequate period in which to effect a reasonable deal, or on the part of the purchaser, who for purely personal reasons or necessities is compelled to pay a higher price than an ordinary purchaser would be willing to pay." (4 Nichols, Eminent Domain [3rd ed.], §12.3113; see also *Matter of Board of Water Supply of the City of New York*, 277 N. Y. 452.)

Both on the law and the facts, the court finds that the sale by assignment from Claimant to the Cooperative was indeed a forced sale. The record abounds with evidence that Claimant was under compulsion to sell to the Cooperative on the Cooperative's own non-negotiable terms. The alternative was certain litigation that might well nigh have frustrated Claimant's plans for the development of Breezy Point.

Upon a consideration of the terms, circumstances and background of the original sale, the court is persuaded that the sale is something less than a normal market sale. The court finds, however, that the transaction was at arms' length and may be so considered. The court is mindful of the general rule of law that a recent sale of the subject property at arms' length is the best evidence of value unless explained away. (*Matter of Lane Bryant v. Tax Commission*, 21 A. D. 2d 669-670, affd. 19 N. Y. 2d 715; see also *Ryan v. State of New York*, 39 A. D. 2d 830; *Vasile v. State of New York*, 30 A. D. 2d 1042, affd. 24 N. Y. 2d 969.) In language that is particularly apt here, the Supreme Court of the United

States said in *Olson v. United States* (292 U. S. 246, 256):

> "He [the owner] may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have changed substantially while held by him • • •. The public may not by any means confiscate the benefits, or be required to bear the burden of the owner's bargain. • • • He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and federal constitution."

In other words, "original cost" or "purchase price" and "value" are not synonymous. (See *United States v. Toronto,* 338 U. S. 396, 403; *United States v. Miller,* 317 U. S. 369; *Lane Bryant v. Tax Commission, supra;* see also *Brighton Plaza, Inc. v. State,* 32 Misc. 2d 266, 271, which reflects a factual pattern quite parallel to the case at bar.) Here, in the light of the overall proof, the court finds that the purchase price ($17.5 million) does not reflect the true or actual value of the property.

THE COURT'S VALUATION

In summary, this is the situation before the court. The total valuations of the experts are:

Claimant (Powers)	$63,500,000
City (Seltzer)	$12,510,750
City (Tuchler)	$11,819,000

To say that there is a gross disparity between the valuations of the Claimant and the City is an obvious understatement.

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The best use found by the court for the Initial Project Area and the Tip is an apartment complex, as zoned.

Both the Claimant and the City use purported comparable sales of vacant land as the sole basis for valuation. However, none of the sales offered by either side is an "exact" comparable.

Normally, the court would be inclined to reject all of the appraisals with a direction that the valuations of the experts be geared to sales that are in fact comparable. (See *Art-Craft Realty Corp. v. State of New York*, 72 Misc. 2d 452.) However, it would be pointless to do so in this case. The court is satisfied that the Claimant and the City have diligently exhausted and submitted all sales that might be of some aid to the court. Indeed, in their post-trial supplementary briefs, following a post-trial conference held on February 8, 1973, all counsel acknowledge, in effect, that there are no additional sales or further factual evidence available on the issue of quantum.

Stated in capsule fashion, this is a case "where there are no appropriate comparable sales, where the land is vacant and unproductive and there is no income to capitalize, where the actual purchase price and the assessed valuation may not furnish a true guide to value". (*Yennock v. State of New York*, 23 A. D. 2d 809, 810.)

In its quest for "just compensation" the court considered all of the evidence including the purchase price paid by Claimant and all sales with particular relation to the Birchwood sale that would afford "a glimmering of the path to the market place."* Also considered was

*See *In re City of New York [Boston-Secor Houses-Rusciano]*, N.Y.L.J., Jan. 21, 1965, p. 16, col. 2 [Sup. Ct., Bronx Co.], revd. 28 A. D. 2d 658, revd. 25 N. Y. 2d 430, wherein the trial court was confronted with factual circumstances not unlike those in the case before this court.

the extensive testimony given by the experts relating to a myriad of so-called "adjustments" including but not limited to factors such as time, location, waterfront view, zoning, topography, soil conditions, size of the parcels, and conversion from gross acreage into net acreage. Seemingly, the proof was offered by the parties in purported observance of the holding in *Latham Holding Co. v. State of New York* (16 N. Y. 2d 41, 45), as to the need for adjusting conditions between comparable sales and the subject property. Although this court considered all of the more important factors or conditions, they cannot be adjusted with any degree of mathematical precision because the proffered comparables are not true comparables. For the court to indulge in arithmetical or percentage adjustments would be a sham. In reaching its overall valuation, the court also considered the proof relating to existing land underwater, and accretion. as well as the probability of claimant's purchasing additional land underwater. (See *Matter of City of New York* [*Public Place*], n.o.r. N.Y.L.J., Feb. 4, 1972, p. 9, col. 5.) As reflected in the following colloquy, the court was also mindful of the state of exploitation and development of the condemned land as a pivotal factor from the standpoint of valuation (SM 59-60):

[Witness, Powers]:

"I think that a prospective purchaser, approaching and examining this property as of the vesting date, would certainly take into consideration all of the planning, all of the construction, all of the groundwork, the engineering that had gone into it, and would certainly consider it when estimating in his mind what the value of this property was.

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[The Court]:

"May I put it this way, Mr. Witness, that you say the state of exploitation, if you will, of the subject property, might well be a factor to be taken into consideration by a prospective purchaser?

• • •

"A. Yes • • •."

After a painstaking consideration of the mass of evidence,* the court finds that the fair market value, as of the title vesting dates, of all of the condemned lands is $31,000,000.

Although tried jointly, these are separate proceedings with different title vesting dates, requiring separate awards for the Initial Project Area and the Tip.

The City's experts valued the Initial Project Area and the Tip, separately, as follows:

Seltzer	
I.P.A.	$6,589,900
Tip	$5,920,850
Tuchler	
I.P.A.	$6,544,001
Tip	$5,275,005

*The considered evidence comprises in excess of 2000 pages of testimony augmented by over 1000 pages of stipulated testimony given at the first trial. There were 113 Claimant exhibits and 97 City exhibits, replete with maps, charts and photographs. Additionally, there were the appraisal reports by each of the experts. It is difficult to conceive of a condemnation case more thoroughly or more ably prepared and tried. The court's task was lessened by the cooperation it received from all of the attorneys before, during and after the trial. The court was also aided by the many briefs submitted by counsel on the various issues involved in the trial of these proceedings. For all of this, the court expresses its appreciation.

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Claimant's expert, Powers, ascribes the same unit valuation of $2.83 per square foot for the Tip as he does for the Initial Project Area, resulting in the previously-stated overall valuation of $63.5 million. There is no question that the Tip area has a substantially lesser value than the Initial Project Area. It is evident from the proof, and the court so finds, that the Tip, as compared with the Initial Project Area, would require a much greater amount of preparatory site work, such as fill and bulkheading. Also, construction on the Tip in furtherance of the planned community development for Breezy Point would not commence for at least four to ten years after the start of construction on the Initial Project Area. Claimant recognizes that there should properly be a discount in the valuation of the Tip because of the indicated deferred utilization of that land. However, Claimant is of the view that any proposed discount would be commensurate with a progressive increase in the value of the Tip. The court does not adopt the equation suggested by the Claimant. Nevertheless, the discount factor has been considered by the court, together with all of the other proof in the case.

Having considered all of the evidence and mindful of the factors as related separately to the Initial Project Area and the Tip, the court makes these awards, as of the title vesting dates:

Initial Project Area:	$16,300,000	(Approximate Unit Value—$2.10 per square foot)
Tip:	$14,700,000	(Approximate Unit Value—$1.00 per square foot)

The valuations, in the view of this court, are "within the compass of relevant proof". (*Matter of City of New York* [*Coogan*], 20 N. Y. 2d 618, 625.) The court does

Opinion of Castaldi, J., Dated April 3, 1973

not profess, however, that the valuations were reached with "mathematical exactitude". In language that is compellingly applicable here, the trial court said in *Matter of Port Authority Trans-Hudson Corp.* (52 Misc. 2d 943, 945-946, mod. 27 A. D. 2d 32, mod. 20 N. Y. 2d 457, mot. to amend remittitur granted 20 N. Y. 2d 968, cert. den. 390 U. S. 1002): "No one can hope to find here the factors necessary for reaching some degree of mathematical exactitude in the ascertainment of just compensation" and "all that can be expected is the attainment of substantial justice". In the same case (20 N. Y. 2d 457, 468), the Court of Appeals observed that when the market value is too difficult to find, the court may apply standards other than a rigid rule for determining what is just compensation. In two cases decided as recently as January 16, 1973, the United States Supreme Court put it this way: "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness • • • as it does from technical concepts of property law". (*Aloma Farmers Elevator and Warehouse Company v. United States,* U. S. , 35 L. Ed. 2d 1, 10; *United States v. Fuller,* U. S. , 35 L. Ed. 2d 16, 20.) The principles just stated have guided this court in making his determinations.

The Corporation Counsel is directed to submit the appropriate decree in accordance with the foregoing.

M. A. C.
J. S. C.

Opinion of the Court of Appeals
Dated June 9, 1971

In the Matter of the City of New York, Respondent-Appellant, Relative to Acquiring Title to Real Property on the Lines of Rockaway Point Boulevard and Other Streets in the Borough of Queens.

In the Matter of the City of New York, Respondent-Appellant, Relative to Acquiring Title to Real Property on the Lines of Beach 222nd Street, Queens and Other Streets in the Borough of Queens. Atlantic Improvement Corporation, Appellant-Respondent.

Argued February 17, 1971; decided June 9, 1971.

Appeal, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of said court, entered June 22, 1970, which unanimously affirmed decrees of the Supreme Court at Special Term (William B. Groat, J.), entered in Queens County, making awards in proceedings by the City of New York to acquire real property for park and street purposes.

Per Curiam. The award of $39,775,208 to claimant for condemnation in 1963 and 1964 by the City of New York of unimproved land in the Breezy Point section of Rockaway peninsula was over seven times the amount the same land in the substantially same condition of improvement had cost claimant three years before in 1960.

The court at Special Term expressly based its award both on "capitalization of estimated income" in projects which claimant proposed to develop but which had not been started or contracted for in the land under consideration on this appeal; and also on "comparable sales".

Opinion of the Court of Appeals Dated June 9, 1971

Since the award was stated in two lump sums, reflecting two physical divisions of the property but not otherwise broken down, it is not possible in reviewing the record to determine to what extent the award was attributed to capitalization of income for projected future development and what extent to sales of comparable properties. But neither theory as developed on the trial will support the award and there must be a new trial.

Although a small portion of claimant's extensive projected plans for the development of its property had been set in motion and construction had begun when condemnation commenced, the city by agreement has paid claimant $5.6 million for the construction costs and agreed to pay it for the 21-acre site of construction on the basis of the acreage award that will be made in this proceeding. This 21-acre section and its improvements were excluded from the condemnation.

The land actually condemned, approximately 122 acres of the "Twin Parks" site and 209 acres of the "tip" site at the end of the peninsula, was unimproved. Plans in considerable detail for a residential apartment development of the "Twin Parks" area had been projected, but no part of the work had been contracted for or started. The proposed development of the "tip" was a plan without detail and this part of the property, low-lying and exposed to strong tidal and wind action, would have required extensive fill to be usable for any residential development. Full utilization of the "Twin Parks" area, as projected, depended in turn on acquisition of additional land from the city under Jamaica Bay and its being filled to usable levels.

The record thus was not in condition to find damages based on "capitalization of estimated income" on these projected future developments. Elaborate forecasts of income from nonexistent structures on land which needed large physical change to be usable for the purpose is not a proper measure of fair market value.

Opinion of the Court of Appeals Dated June 9, 1971

This reflects a settled principle reiterated in *Arlen of Nanuet* v. *State of New York* (26 N Y 2d 346) where the question posed was "whether it is permissible to fix the market value of land, completely bare when condemned, solely on the basis of capitalization of income expected to be realized from buildings and other extensive improvements not yet financed, on which no work had even been begun on the day of taking" (p. 351). That question was answered in the negative.

It was noted that "No shopping center was appropriated by the State. The vacant lot which it took was not a shopping center and, certainly, the agreements among financially responsible people about what they planned to do in the future with that lot did not transform it into one" (pp. 355–356).

On the capitalization of income based on future projections of unstarted plans, *Nanuet* is indistinguishable from the present case. The court in *Nanuet* on analysis of *Levin* v. *State of New York* (13 N Y 2d 87) found *Levin* was consistent with the rule laid down in *Nanuet* (26 N Y 2d, at pp. 352–353; see, also, *City of New York* [*Shorefront High School—Rudnick*], 25 N Y 2d 146, 149; *Triple Cities Shopping Center* v. *State of New York*, 26 A D 2d 744, affd. 22 N Y 2d 683).

Nor does the proof of sales of comparable parcels meet the need in this case to support the award of $39 million by competent and sufficient evidence. The parcels used for comparison were so different from the land in issue as to throw no helpful light on the fair market value of the land condemned.

The land in issue was not only vastly larger than the land to which it was compared, and markedly different in adjacent development, but its physical location on the Rockaway peninsula differed radically.

Indeed the only directly comparable property suggested by the record was the sale of 415 acres of contiguous land by claimant's predecessor, controlled by the same interests which control claimant, in 1960 for $11.9 million. This land and the acreage involved in this proceeding was purchased in 1960, for a total of $17.5 million for 785 acres. The net cost to the claimant of the remaining land now condemned, therefore, was about $5.5 million.

The evidence of comparables is tainted with the same legal error that makes the capitalization projections unacceptable. The city correctly contends that it was error of law to receive at the trial evidence of 51 sales of parcels in long-established, densely populated residential centers in Brooklyn and Queens; error, because the subject property was raw, vacant land in a remote inaccessible, undeveloped area.

Indeed this was conceded in principle by claimant's chief witness Wittman who on examination by the Trial Judge testified he could not find anything reasonably similar in the metropolitan area and, therefore, he converted the subject land into comparability with 51 sales of land which had been utilized for middle-rise and high-rise apartment houses located in fully populated and long-established residential centers.

He testified: "I can't compare an incomparable. It is impossible to make a comparison of a built up area to Breezy Point without considering it being built up and then deducting the cost." Since there was nothing similar in size in the area, the witness noted he did the "next best thing" to find available sales "that I could make adjustments to", to find the indicated value of the land.

What Mr. Wittman was saying was, of course, that if he had not used the capitalization projections at Breezy Point, he would not have been able to point to the sites of developments used as comparables. In short, the predicate of claimant's case on comparables was the capitalization projections and, therefore, claimant's case on comparables falls, as a matter of law, in the same way as the valuations based directly on capitalization.

Essentially, therefore, the claimant's proof of comparable sales was dependent on acceptance of income capitalization in different terms. The theory essentially depended on the projected completion of claimant's entire future plan at a cost for construction alone of $275 million and on comparison of this projection with the other sample properties that had been completed.

The general rule as to comparable sales is that they must relate to property in the vicinity "*similar* to the property taken" (*St. Agnes Cemetery* v. *State of New York*, 3 N Y 2d 37, 44) and an erroneous theory of valuation presents a question of law (*Latham Holding Co.* v. *State of New York*, 16 N Y 2d 41, 44).

It should not be a matter of insuperable difficulty for claimant to establish the fair market value of the land taken in its actual physical state without recourse either to capitalization of income on unstarted projects or to comparisons of other properties essentially dependent on the same future projects. Some consideration should be given to the sale of the large acreage of contiguous land by claimant's predecessor a few years before condemnation as well as the price paid by claimant for the land itself.

On the city's further contention that it had title derived from the State of New York to the foreshore area between mean high tide and mean low tide, claimant has been correctly held at Special Term to be the owner.

The statute (L. 1923, ch. 476) under which the city claims title contained a condition that acquisition of title depended on the city's laying out beach lines. This was not done, and the statute was repealed (L. 1937, ch. 929). This prevented the city from later acquiring title by laying out beach lines.

In 1948 the State granted to the Rockaway Point Development Corporation, claimant's predecessor in title, land which had accreted since 1930, including the present " tip ". This was in settlement of litigation to which the city was a party; and in 1962 the State made a further grant to claimant of the land which had accreted since 1948 and of the submerged land that would accrete for the next 20 years. Thus, if the State had not lost its title to land under water by the 1923 statute, claimant has become vested with the State's interest in the land under water and the accretions to it which the city now claims.

Besides this it seems evident that the State's interest before 1923 had passed to the predecessors in title of claimant and that the State had no remaining right then to convey to the city. In 1887 the State had conveyed to Henry Y. Attrill all its right and interest in land then known as Rockaway Beach. Attrill is a predecessor in title to claimant. The city argues that this release did not cover the foreshore because it was in terms stated that the land release was " bound • • • by " the ocean and other public waters and this term usually conveys only to the high-water mark.

Whatever may be the usual effect of such a term, it has been adjudicated in litigation between claimant's predecessor and the State, in which the city also was a party, that the statutory release to Attrill of 1887 included the foreshore (*Rockaway Pacific Corp.* v. *State of New York*, 122 Misc. 503, affd. 214 App. Div. 843, affd. 243 N. Y. 556 [1926]). Since the city was also a claimant in the proceeding it would be bound by that determination, but in any case it was a determination which bound the State upon whose title both the city and claimant rest and thus the city would be collaterally estopped.

Opinion of the Court of Appeals Dated June 9, 1971

The order should be modified, without costs, by reversing the award to claimant and the matter remitted to the Supreme Court, Queens County, for further proceedings on the question of damages in accordance with this opinion and, as modified, affirmed, without costs.

Chief Judge FULD and Judges BURKE, SCILEPPI, BERGAN, BREITEL, JASEN and GIBSON concur in *Per Curiam* opinion.

Ordered accordingly.

SAME TITLE

Motion for Reargument denied.

July 7, 1971

Opinion of Appellate Division
Dated June 22, 1970

1602 E, 1602 AE

In the Matter of

THE CITY OF NEW YORK (Rockaway Point Blvd., etc., Queens; Index No. 13004-1963).

In the Matter of

THE CITY OF NEW YORK (Beach 222nd Street, etc., Queens; Index No. 7324-1964).

ATLANTIC IMPROVEMENT CORPORATION (DP 1-16 incl., 16A, 16B, 18, 19, 20, 22-34 incl.),

Claimant-Appellant-Respondent,

CITY OF NEW YORK,

Appellant-Respondent.

Two first separate and partial final decrees of the Supreme Court, County of Queens, both dated February 14, 1969, one as to damage parcels 1 to 16, inclusive, 16A, 16B, 18, 19 and 20, and the other as to damage parcels 22 to 34, inclusive, affirmed insofar as appealed from, without costs.

In affirming the above decrees we are not unmindful of the recent decision by the Court of Appeals in Matter of the City of New York (Manhattan Civic Center Area—Boehm; Duane Reade Corp.) (— N Y 2d — [dec. May 14, 1970], affg. 32 A D 2d 530), which by its affirmance, determined the interest rate in situations comparable to the one at bar to be 6% beginning August 1, 1966. In this respect

Opinion of Appellate Division
Dated June 22, 1971

we note that in the instant proceedings Special Term, by its decision dated January 27, 1969, stated that, in view of the cases now on appeal on the question of the maximum rate of interest, the final decree "shall not prejudice the claimant seeking a modification thereof in the event that the appellate courts should allow interest at a rate in excess of that presently permissible." Absent an express provision for interest in the decrees presently before us and absent a request in the briefs for a modification of the decrees so as to include permissible interest, the parties are relegated to seeking such modification with respect to interest as they may be advised.

RABIN, *Acting P.J.*, HOPKINS, MARTUSCELLO and BRENNAN, concur.

(BELDOCK, *P.J.*, deceased)

June 22, 1970

CITY OF N. Y. (ROCKAWAY POINT BLVD.)
1602E, 1602AE

Opinions of the Supreme Court of the State of New York, Groat, J.

SUPREME COURT:

QUEENS COUNTY,

Special Term For Condemnation Proceedings.

IN THE MATTER

of

The Application of THE CITY OF NEW YORK, relative to acquiring title in the real property where not heretofore acquired, for the same purpose, for park and street purposes to

ALL those certain lots, pieces or parcels of land together with any improvements erected thereon, situate, lying and being in the Borough and County of Queens, City and State of New York within (1) the lines of Rockaway Point Boulevard from Beach 184th Street to Beach 201st, (2) the park bounded generally by Rockaway Point Boulevard, Beach 201st Street. Rockaway Inlet (Jamaica Bay), Bayside Drive and Beach 184th Street, and (3) the park bounded generally by Rockaway Point Boulevard, Beach 193rd Street. Fort Tilden, the Atlantic Ocean and Beach 201st Street, etc. in the Borough of Queens, City of New York.

Index #13004-63

Opinions of the Supreme Court of the State of New York, Groat, J.

In the Matter

of

The Application of The City of New York, relative to acquiring title in the real property where not heretofore acquired, for the same purpose, for park and street purposes to

All those certain lots, pieces or parcels of ground, together with any improvements erected thereon, situate, lying and being in the Borough and County of Queens, City and State of New York, within (1) the lines of a park bounded generally by the westerly line of Beach 222nd Street and its prolongations, Rockaway Inlet and the Atlantic Ocean as said is laid out on a map approved by the Board of Estimate on April 23, 1964, (Calendar 271), and within (2) the bed of Rockaway Point Boulevard from Beach 201st Street to Beach 222nd Street, etc. in the Borough of Queens, City of New York.

Index #7324/64

Supplemental Opinion of Groat, J.,
Dated June 24, 1968

Dated: June 24, 1968

By: GROAT, J.

In a previous memorandum dated June 13, 1968, the Court awarded claimant the sum of $39,775,208.00 in this condemnation proceeding, in addition to the sum of $4,000,000.00 awarded during trial for trade fixtures and other items set forth in said memorandum.

The award of $39,775,208.00 is made applicable to the two portions condemned by separate orders of condemnation, as follows:

"Two Parks" Area—$21,296,439.00
Tip Area —$18,478,769.00

The Corporation Counsel is directed to prepare and submit the first, separate and partial tenative decree.

W. B. G.
J. S. C.

Opinion of Groat, J., Dated June 13, 1968

Dated: June 13, 1968

By: GROAT, J.

These are jointly-tried proceedings in eminent domain instituted by the City of New York relative to acquiring title to certain tracts of land for park purposes on the western tip of the Rockaway Peninsula in the Borough of Queens, City of New York, and known generally as "Breezy Point". The trial of this matter encompassed some 25 days.

In January, 1961, the Rockaway Point Development Corporation conveyed a tract of land extending from the north and west of Fort Tilden west to the tip of the Rockaway Peninsula, consisting of more than 800 acres, to the claimant and Breezy Point Cooperative, Inc. The Cooperative took title to a section located approximately between Beach 201st Street and Beach 222nd Street and to Roxbury, a section of about 45 acres, in the northeast end of the tract. Title to the balance, including the tip and the interior section located between Beach 201st Street and Fort Tilden, was deeded to the claimant.

By an order of this court dated November 22, 1963, title to most of the interior section (hereinafter referred to as the "Two Parks area") vested in the City. An L-shaped portion of the interior section, consisting of about 20 acres and located on the west side of Fort Tilden, was not included in the November 22nd order of condemnation and, therefore, it is not included in this proceeding.

Title to the tip vested by an order of condemnation dated August 28, 1964.

Opinion of Groat, J., Dated June 13, 1968

The City has contended that it had title to the foreshore prior to condemnation. This contention was the subject of an application to this court in the latter part of 1966. Mr. Justice Conroy, in a long and well-reasoned opinion dated December 2, 1966, denied the City's application and, therefore, the foreshore area is considered in determining the value of the taken land.

The value of the land must be determined in relation to the highest and best use to which claimant might reasonably put it. (*Matter of City of New York [Clearview Expressway]*, 9 N. Y. 2d 439, 445; *St. Agnes Cemetery v. State of New York*, 3 N. Y. 2d 37, 41.) Upon the evidence presented, claimant's planned use of the land as a residential community does not appear unreasonable. (Cf. *United States v. 25,406 Acres of Land*, 172 F. 2d 990.) Wherefore, the court finds that the highest and best use thereof was for a residential community of apartment houses, garden apartments or town houses and private homes with integrated retail business facilities and with portions of the waterfront developed as a marina or such recreational facility.

During the trial of this proceeding, the court, by oral decision, determined the value of all the buildings, machinery, trade fixtures and other items set forth in claimant's exhibits 96 and 97 and the sewerage system as set forth in claimant's exhibit 98 and awarded $2,800,000.00 for such property in the Two Parks area and $1,200,000.00 for such property in the tip area.

The court has reviewed the record, including the appraisals, and has considered the evidence in light of both comparable sales and capitalization of estimated income (see *Levin v. State of New York*, 13 N. Y. 2d 87), being cognizant of the limitations of both systems of real estate appraisal as applied to the realty in question (*Latham Holding Co. v. State of New York*, 16 N. Y. 2d 41; *Levin v. State of New York, supra*), and, having made the statutory view, makes the following award: $39,775,208.00.

The Corporation Counsel is directed to prepare and submit the first, separate and partial tentative decree.

W. B. G.
J. S. C.

(Seal.)